SUBJECT INDEX

	Page
INTRODUCTION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	20

TABLE OF AUTHORITIES

Cases *Page*

Alaska Steamship Co., Inc. v. Petterson, 347 U. S. 396, 74 S. Ct. 601 (1954) 16

Alexander v. Bethlehem Steel Corp., 382 F. 2d 963 (2nd Cir. 1967) 9

Antoine v. Lake Charles Stevedores, Inc., 376 F. 2d 443 (5th Cir. 1967), cert. den. 389 U. S. 869, 88 S. Ct. 145 11

Benton v. United States Lines, Inc., 297 F. Supp. 87 (D. Md. 1968), aff. 408 F. 2d 378 (4th Cir. 1969) 11, 15

Calbeck v. Travelers Ins. Co., 370 U. S. 114, 82 S. Ct. 1196 (1962) 18

Candiano v. Moore-McCormack Lines, Inc., 382 F. 2d 1961, rehearing den. 386 F. 2d 444 (2nd Cir. 1967) 9, 10, 12, 13, 18

Cleary v. United States Lines Co., 411 F. 2d 1009 (2nd Cir. 1969) 10

Dugas v. Nippon Yusen Kaisha, 378 F. 2d 271 (5th Cir. 1967) 15

Duncan v. Transeastern Shipping Corp., 413 F. 2d 1023 (5th Cir. 1969) 11

TABLE OF AUTHORITIES (Continued)

Cases *Page*

Grigsby v. Coastal Marine Service of Texas, Inc., 412 F. 2d 1011 (5th Cir. 1969), cert. dismissed ..... U. S. ....., 90 S. Ct. 612 (1970) 11, 18

Grillea v. United States, 232 F. 2d 919 (2nd Cir. 1956) 9

Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 83 S. Ct. 1185 (1963) 17

Hagans v. Ellerman & Bucknall Steamship Co., Ltd., 318 F. 2d 563 (3rd Cir. 1963) 17

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277 (1952) 16

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U. S. 315, 84 S. Ct. 748 (1964) 15

Jackson v. Lykes Bros. Steamship Co., Inc., 386 U. S. 731, 87 S. Ct. 1419 (1967) 17

Lundy v. Isthmian Lines, Inc., 423 F. 2d 913 (4th Cir. 1970) 11

Marshall v. Ove Skou Rederi A/S, 378 F. 2d 193 (5th Cir. 1967) 15

Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705 (1967) 3, 9, 11

Cases *Page*

Mitchell v. Trawler Racer, Inc.,
362 U. S. 539, 80 S. Ct. 926 (1960) 7, 8

Moragne v. States Marine Lines, Inc.,
..... U. S. ....., 90 S. Ct. 1772 (1970) 19

Reed v. MV Foylebank,
415 F. 2d 838 (5th Cir. 1969), cert. den.
..... U. S. ....., 90 S. Ct. 909 (1970) 11

Reed v. Steamship YAKA,
373 U. S. 410, 83 S. Ct. 1349 (1963) 17

Robichaux v. Kerr McGee Oil Indus., Inc.,
376 F. 2d 447 (5th Cir. 1967) 11

Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U. S. 124, 76 S. Ct. 232 (1956) 16

Seas Shipping Co. v. Sieracki,
328 U. S. 85, 66 S. Ct. 872 (1946) 5, 6

Skibinski v. Waterman Steamship Corporation,
360 F. 2d 539 (2nd Cir. 1966) 14, 18

Tarabocchia v. Zim Israel Navigation Co., Ltd.,
417 F. 2d 476 (2nd Cir. 1969) 10

Taylor v. S/S Helen Lykes,
402 F. 2d 777 (5th Cir. 1968) 11

TABLE OF AUTHORITIES (Continued)

Cases *Page*

Thompson v. Calmar Steamship Corp.,
331 F. 2d 657 (3rd Cir. 1964), cert. den.
379 U. S. 913, 85 S. Ct. 259 ..... 13, 16

Tim v. American President Lines, Ltd.,
409 F. 2d 385 (9th Cir. 1969) 11

Venable v. A/S Det Forenede Dampskibsselskab,
399 F. 2d 347 (4th Cir. 1968) 11

Treatises *Page*

3 Larsen, Workmen's Compensation,
Tables, 503-65 (1969) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 47

JOSEPH CHARLES USNER,

Petitioner,

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS

INTRODUCTION

This case presents a single, clear-cut issue: Does the instantaneous negligence of a longshoreman which is the sole and proximate cause of an injury sustained by a fellow worker give rise to a claim for damages against the vessel on which the men are working on some theory that the vessel, otherwise in every respect seaworthy in fact, has in that instant become unseaworthy? The Court of Appeals for the Fifth Circuit has answered "No". Your Honors are solicited by the petition for certiorari to reverse and hold "Yes".

Petitioner, an employee of an independent stevedore, brought this suit in the Eastern District of Louisiana

against Luckenbach Overseas Corporation and Isthmian Lines, Inc., alleging that he sustained an injury to his hip while handling cargo from the S/S *Edgar F. Luckenbach*. The record indicates that when petitioner was preparing to sling a lift, he motioned to the flagman to signal the winch operator to lower the sling a bit further. The winch operator did so, but lowered it too far. The sling struck the petitioner, injuring him. The petitioner, the flagman, and the winch operator were all fellow employees of T. Smith & Son, Inc., the independent stevedoring company handling the vessel. The Court of Appeals for the Fifth Circuit characterized the situation as one involving simple negligence saying:

> "Neither before nor after the accident was any trouble experienced with the winch, booms, slings, or any other equipment; nor is there any contention that the winches were operated in a systematically negligent manner that would constitute unseaworthiness. The only way in which the vessel could be said to be unseaworthy would be if this one instance of operational negligence on the part of the stevedore operating the winch could be said to constitute unseaworthiness."[1]

Both of the parties and both the trial court and the appellate court agreed that the affidavits introduced by respondents in support of a motion for summary judgment filed by them showed there to be no genuine issue of fact presented for decision. Respondents' motion was denied, but on motion for rehearing, the District Judge certified that there was a substantial ground for a difference of opinion on the legal question involved, and that

[1] Opinion below, A. 100.

an immediate appeal might materially advance the ultimate termination of the litigation under 28 U.S.C. 1292(b). The Court of Appeals allowed the appeal from the interlocutory order and took jurisdiction of the case.[2]

Although the District Judge believed the case to be governed by the decision of Your Honors in *Mascuilli*,[3] the Court of Appeals took the opposite position on the interpretation of that opinion and followed its prior decisions to the effect that simple operational negligence at the moment of injury did not cause a vessel to be unseaworthy. Accordingly, the decision below was reversed with instructions to enter judgment for defendants on the motion for summary judgment. Your Honors granted certiorari on the petition of plaintiff.

SUMMARY OF ARGUMENT

It is respondents' position that the instantaneous negligence of a longshoreman which causes injury to a fellow longshoreman does not give rise to a claim for recovery against the shipowner on the grounds of unseaworthiness. The existence of an unseaworthy condition is a pre-requisite to such liability. By definition, "unseaworthiness" connotes *condition* rather than *causation*. The present uncertainty in the jurisprudence stems from a misinterpretation by some lower courts of the holding of this Court in the *Mascuilli* case, and represents their appreciation of that decision rather than their independently reached conclusions.

Respondents submit that the shipowner is not the insurer of the safety of a longshoreman on board a vessel,

[2] A. 92 et seq.
[3] Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705 (1967).

and there is no economic, social or logical justification for an extension of the existing rules to cover such a situation.

Accordingly, the decision of the court below (to the effect that the instant negligence of a longshoreman did not constitute instant unseaworthiness so as to create a cause of action in favor of an injured co-worker) should be affirmed.

ARGUMENT

In the words of the Court of Appeals for the Fifth Circuit:

> "The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition."[4]

It is our submission that the decision below resolving this issue in the negative should be affirmed. Petitioner complicates this hearing unduly by urging that three questions are presented by the petition, rather than the one question to which we have adverted. We submit that those questions numbered (1) and (3) purportedly presented by the record are subsidiary to and are subsumed by question (2): An answer to that question "Does operational negligence at the moment of injury render the vessel unseaworthy?" automatically renders unnecessary any separation of the case into subsidiary issues.

---

[4] Opinion below, A. 100.

The Court is here squarely presented for the first time with what is called "instantaneous unseaworthiness", a kind of amorphous state which rather defies explanation in historical concepts or in the limits of judicial precedents of this Court. A new and perfectly built and operated ship, because of the negligent act of a longshoreman, becomes "unseaworthy" in an instant for an instant, during which split second interval a fellow worker is hurt. The injured man, we submit, has a single remedy—that provided him under the Harbor Workers' Act. He cannot and should not be accorded a recovery against the ship.

Unseaworthiness has always connoted condition, just as negligence has always connoted causation. It is, of course, recognized that as a matter of logic, the unseaworthy condition usually will have been caused by some human act or omission, tested according to some predetermined standard. If a longshoreman steps on a hatch board which is too short and falls into the hold of a ship, he may bring an action against the ship based upon the unseaworthiness, which was initiated, of course, by someone improperly placing the hatch board in a dangerous position. It is impossible, therefore, completely to divorce condition from causation if one goes back in the chain of events far enough to attempt to find out the reason why the unseaworthiness exists, but exist it must.

The doctrine that a recovery should be granted to a longshoreman for injuries caused by the unseaworthiness of the vessel on which he was working stems directly from *Sieracki*,[5] decided in 1946 with three justices dissenting. In that case, Your Honors will recall that Justice Rutledge had great difficulty in characterizing the scope and basis

[5] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946).

of liability. After having found that a seaman was helpless to protect himself against improper conditions which might exist on board ship, he held that the same rule should be applied to those who historically did the work of seamen, including the work of loading or discharging cargo. He classified the shipowner's liability for unseaworthiness as:

> "essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. (Citations omitted.) It is a form of absolute duty owing to all within the range of its humanitarian policy."[6]

Even though the language of Justice Rutledge is all inclusive, no one has ever gone so far as to say that the vessel owner is the insurer of the safety of every worker who boards the vessel. On the contrary, every court that has had an opportunity to express itself on the question has firmly and unequivocally held that a shipowner is not an insurer of the safety of men working aboard the ship. A shipowner's liability still stems from unseaworthiness or negligence, and in the absence of a finding that one or the other was the cause of injury, judgments necessarily go against the personal injury claimant.

What, then, is meant by unseaworthiness? The courts have progressed in the field of personal relations into new areas where humanitarian doctrines and the complexities of our existing twentieth century social system

---

[6] 328 U. S. at 94-95; 66 S. Ct. at 877.

have been reflected in the thinking of the judiciary as well as in the philosophy of our lawmakers and our leaders of industry. The result has been an ever-broadening liability of the shipowner to an extent not dreamed of three or four decades ago. A ship may now become actionably unseaworthy while at sea as well as in foreign ports, even though it departed on its voyage in perfect condition. The dynamic concept of unseaworthiness over the years has moved to where it now includes transitory unseaworthiness, and, as has been stated in now classic language, the origins of the doctrine are no longer important in circumscribing its reach in the field of personal injuries. Nonetheless, condition is always the predicate of liability. That lesson comes from the *Trawler Racer*, where Justice Stewart said:

> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.
>
> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a

> ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."[7]

Nowhere has counsel been able to find any suggestion that the basic pre-requisite of the existence of an unseaworthy condition as a foundation for liability has been abandoned by the courts. Even though the condition is transitory and even though it is not known to the shipowner, it is nevertheless an existing condition upon which liability is based. In the instant case, petitioner would have the Court do exactly what has been held improper: tear up the pages of history and hold that condition is not a pre-requisite to a finding of unseaworthiness. It is impossible, we submit, for there to be any justification for such a change or extension of the doctrine. Quite apart from the fact that no economic or social need exists for a more liberal or humanitarian approach to compensation for a disabling injury sustained by a longshoreman,[8] the recovery which the injured party seeks in this case is a recovery over and above that accorded to him under the compensation law enacted for his benefit. Indeed, there is sought here an enlargement of the circumstances under which there is paid that extraordinary bonus which is granted to this type of employee alone of all of the workers on the American industrial scene.

It is probable that the doctrine of operational negligence causing actionable unseaworthiness stems, in the

---

[7] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550; 80 S. Ct. 926, 933 (1960).

[8] Injuries sustained by a longshoreman are compensable under the Fed-Longshoremen's and Harbor Workers' Compensation Act at a rate substantially in excess of that provided for in most state compensation acts. 3 Larsen, Workmen's Compensation, Tables, 503-65 (1969).

Second Circuit at least, from the rather early decision of that Court in *Grillea.*[9] In that case, the fact that a longshoreman had misplaced a hatch cover so as to cause it to be in a dangerous position created a condition of unseaworthiness which resulted in an accident. The fact that the cover was otherwise perfect was of no moment: its misplacement created the unseaworthy condition, and even though the physical act of misplacing the cover might stem from negligence, the vessel was nevertheless unseaworthy at the time of the accident.

"Instantaneous negligence", accordingly, was not a factor in that case any more than it would be in any other case where unworkmanlike conduct in a loading or discharging operation aboard ship has been held to create a condition which causes an injury to a longshoreman. *Candiano*[10] likewise involved unseaworthiness. Hooks had been inserted in holes in each end of a beam being lowered into a hold, but one of the hooks became dislodged and the beam fell, causing the injury. The fact that the hook had been negligently attached to the beam caused the ship to become unseaworthy, but again the condition of unseaworthiness was encountered by the injured longshoreman.

Following *Candiano* came *Alexander*[11] (decided on the same day), where the claimed unseaworthiness stemmed from an improper placing of dunnage as well as from an incompetent crane operator whose negligence displaced the dunnage.

---

[9] Grillea v. United States, 232 F.2d 919 (2nd Cir. 1956).

[10] Candiano v. Moore-McCormack Lines, Inc., 382 F. 2d 961, rehearing den. 386 F. 2d 444 (2nd Cir. 1967).

[11] Alexander v. Bethlehem Steel Corp., 382 F.2d 963 (2nd Cir. 1967).

Next in the line of cases decided in the Second Circuit would seem to be *Cleary*,[12] which involved the negligent spotting of a boom coupled with negligent operation of the winches. The condition (improper spotting) pre-existed the negligence of the winch operator and the decision is consonant with the others of this line.

Following the line is *Tarabocchia*,[13] where the Court held the ship liable for an accident caused by the negligent handling of a sling by the stevedore's employees, causing a platform to fall and injure the plaintiff. Judge Moore sat on that panel and pointed out that the Second Circuit had

> "committed itself to the proposition that operational negligence must be equated with unseaworthiness of the ship. We have thus crossed our Rubicon and if we are to retreat from our position, it must be over a bridge constructed by the Supreme Court when, as and if it may choose to resolve the apparent conflict between the Circuits. To hold that a negligent act of an employee of a stevedore can instantaneously turn a proud seaworthy ship into an unseaworthy floating object may seem to defy common sense but 'unseaworthiness' may have become a term of art wholly unrelated to reality. Possibly in a semantic way we are dealing with what is 'essentially a species of liability without fault'. (Citation omitted) But whatever be the rationalization process, if any, the trial court correctly followed our

---

[12] Cleary v. United States Lines Co., 411 F. 2d 1009 (2nd Cir. 1969).

[13] Tarabocchia v. Zim Israel Navigation Co., Ltd. 417 F. 2d 476, 477 (2nd Cir. 1969).

conception of *Mascuilli* and his decision as to liability must be affirmed."[14]

It is not hard to discern from these four opinions that the Second Circuit would never have gone so far as to hold that operational negligence constitutes unseaworthiness were it not for the fact that it interpreted *Mascuilli* as requiring that result.

Mascuilli indeed is the forerunner of the conflict between the Circuits, for despite the majority opinion in *Venable*,[15] the ruling on the petition for rehearing shows that Fourth Circuit *en banc* was of the opinion that although operational negligence might cause unseaworthiness, every such instance did not create an unseaworthy condition so as to give rise to liability.

On the other hand, the Ninth[16] and the Fifth[17] Circuits have taken an exactly opposite position. (It would not appear amiss to here note that the Chief Justice, sitting as a Circuit Judge in *Grigsby*, was a member of the unanimous court deciding that case.)

If all of the opinions referred to in the Circuits were closely analyzed, another facet would become apparent:

---

[14] 417 F. 2d 476, 478.

[15] Venable v. A/S Det Forenade Damp. 399 F. 2d 347 (4th Cir. 1968); but see Benton v. U. S. Lines, Inc., 297 F. Supp. 87 (D. Md. 1968), aff. 408 F. 2d 378 (4th Cir. 1969); and Lundy v. Isthmian Lines, Inc., 423 F. 2d 913 (4th Cir. 1970).

[16] Cf. Tim v. American President Lines, Ltd., 409 F. 2d 385 (9th Cir. 1969).

[17] Antoine v. Lake Charles Stevedores, Inc., 376 F. 2d 443 (5th Cir. 1967), cert. den. 389 U.S. 869, 88 S. Ct. 145; Robichaux v. Kerr McGee Oil Indus., Inc., 376 F. 2d 447 (5th Cir. 1967); Taylor v. S/S Helen Lykes, 402 F. 2d 777 (5th Cir. 1968); Grigsby v. Coastal Marine Service of Texas, Inc., 412 F. 2d 1011 (5th Cir. 1969), cert. denied ..... U. S. ....., 90 S. Ct. 612 (1970); Duncan v. Transeastern Shipping Corp., 413 F. 2d 1023 (5th Cir. 1969); Reed v. MV Foylebank, 415 F. 2d 838 (5th Cir. 1969), cert. den. —U.S.—, 90 S. Ct. 909 (1970); and the opinion below in the instant case.

the almost hopeless task faced by the district judges and trial counsel in giving and framing instructions to juries in those types of cases. Several judges of the Second Circuit, although deciding appeals in consonance with their appraisal of the jurisprudence, deplored the rationale of the entire theory, having in mind, apparently, their own experiences as District Judges.

"A paucity of consistency" is said to exist in the cases. Judges rail "against the necessity of stultifying their judicial minds by being required 'to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong' . . . and to make 'trivial, meaningless and confusing distinctions.' "[18]

In the same concurring opinion of Judge Moore from which the quotation comes, he brings home with great clarity the dilemma of the trier of fact:

> "The real difficulty in the future will arise at the trial level. If there are any facts to be determined by a jury other than assessment of damages and contributory negligence, how is the trial judge to charge? Is 'operational negligence' to be mentioned at all? When does the 'operation' commence? How momentary is a 'momentary interval'? Is 'instant negligence' to be added to 'instant unseaworthiness'? Many other similar questions undoubtedly will arise."[19]

Further examples of the pitfalls into which a trial court will fall if operational negligence is considered as unseaworthiness are illustrated in the dissent of Judge

---

[18] Moore, J. concurring in Candiano, supra, (on rehearing) quoting Friendly, J. and Kaufman, C. J.
[19] 386 F. 2d at 448.

Hastie in *Thompson v. Calmar Steamship Corp.*,[20] as follows:

> "Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed. Does this decision mean that when a pilot negligently maneuvers a ship against a bridge or a pier, the steering apparatus is unseaworthy? If a stevedore negligently allows tackle to fall to the deck injuring someone, is the gear unseaworthy? If one passenger injures another by carelessly using some sports equipment supplied by the ship, is this equipment unseaworthy? If it seems ridiculous to apply the concept of unseaworthiness to such cases as these, I think the incongruity lies not with the choice of examples but with the present decision which seems to embrace all such situations."

The concept of a vessel becoming unseaworthy because of the misuse or negligent use by a longshoreman of proper gear is, we submit, at variance with the theory of liability and with the basic reasons originally existing for granting seamen this type of remedy and extending the doctrine to apply to longshoremen. It is our submission that the rules of the game have now changed to such an extent that the original game is no longer recognizable.

---

[20] 331 F. 2d 657, 663 (3rd Cir. 1964), cert. den. 379 U.S. 913, 85 S. Ct. 259.

As Judge Friendly said in his dissent in *Skibinski*,[21] echoing the dissatisfacton expressed by Judge Hastie:[22]

> "It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more than casuistry. Indeed, I suspect we would long since have revolted against a principle which capriciously imposes liability on a thoroughly well equipped ship if we did not know that in the usual case, where the plaintiff 'seaman' is shore-based, the story will have a happy ending for the ship since liability will rest on her only for a moment and then will be transferred to the stevedoring contractor. By very definition, improper use of ship's equipment triggers the contractor's warranty of workmanlike service, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the ship regularly impleads the stevedore, and there the burden falls. To me this argues for a restrictive rather than an expansive notion of unseaworthiness in these situations; courts should not strain to use the ship, innocent in every realistic sense, merely as a conduit for imposing on the negligent employer a liability to his employees differing from the absolute but limited one which Congress made exclusive by § 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §

---

[21] Skibinski v. Waterman Steamship Corporation, 360 F. 2d 539, 543 (2nd Cir. 1966).

[22] Supra, n. 20.

905. Of course the statute did not impair an injured longshoreman's right against third parties who have wronged him, 33 U.S.C. § 933. But proper respect for what Congress was 'driving at,' see *Johnson v. United States*, 163 F. 30, 32, 18 L.R.A.,N.S., 1194 (1 Cir. 1908) (Holmes, J.) ought to lead judges away from a doctrine which so frustrates the legislative purpose by imposing a transitory liability on a third party that has turned over a thoroughly seaworthy vessel to a qualified stevedore. If the benefits under the Compensation Act are inadequate, the remedy lies in action by Congress, not in judicial legerdemain which helps one longshoreman but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law."

Just how far can the doctrine be carried and where can it be stopped? Is there any difference between a piece of dunnage slipping out of a draft being lowered into a hatch[23] and a beam slipping out of a sling while being lifted?[24] And what is the difference between dunnage or a beam falling from a sling and a wrench being thrown from deck to a lower hold?[25] How can such incidents make the vessel unseaworthy?

And if a stevedore makes a ship unseaworthy by bringing on board a latently defective hatch tent[26] or a defec-

---

[23] Dugas v. Nippon Yusen Kaisha, 378 F. 2d 271 (5th Cir. 1967).
[24] Marshall v. Ove Skou Rederi A/S, 378 F. 2d 193 (5th Cir. 1967).
[25] Benton v. U. S. Lines, Inc., supra, n. 15.
[26] Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U.S. 315, 84 S. Ct. 748 (1964).

tive snatch block,[27] does the vessel become unseaworthy if a longshoreman carrying his tin lunch pail drops it on his fellow worker's head when the bail pulls out of its socket? If injuries caused by these events are held to be due to unseaworthiness, at what split second did the unseaworthy condition arise?

These questions are not asked in a vacuum. They are questions that arise daily in the courts of first instance, and any judge framing instructions to a jury must indeed walk a narrow line to stay within the bounds of current rulings.

Like Judge Hastie in *Calmar, supra*, we urge that unseaworthiness should signify some inherently unfit, unsound or unsafe condition in a vessel, which in fact does not become unseaworthy because of some negligence of a contractor employed to work on it, whether or not he is doing the work traditionally performed by seamen.

It is submitted in all earnestness that a longshoreman working on a ship was intended to have a remedy against his employer based on the employer-employee relationship and that no other remedy was intended by the Congress to be granted to him insofar as his employer was concerned. The advent of the *Ryan*[28] doctrine, coupled with the holding[29] that concepts of comparative negligence are not applicable in the field of a stevedore's working arrangements with a shipowner, to which has been added the elimination of the exclusive liability features of the Harbor Workers' Act, when applied to a shipowner act-

---

[27] Alaska Steamship Co., Inc. v. Petterson, 347 U.S. 396, 74 S. Ct. 601 (1954).

[28] Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232 (1956).

[29] Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277 (1952).

ing as stevedore on his own ship,[30] have indeed made these waters rough seas upon which to sail. A longshoreman injured through classic unseaworthiness of a vessel, i.e., an inherent deficiency in her hull, machinery, gear or equipment, should, of course, have a right to make a third party claim against a shipowner and that right is clearly accorded to him under the Harbor Workers' Act. It is a far cry, however, to torture this statutory right into the judicially created cause of action based upon unseaworthiness "brought into play" by the employer of the injured man. For the negligence of the employer bringing this type of unseaworthiness into play, the longshoreman has his remedy under the Harbor Workers' Act solely and exclusively against his employer. We urge that he not be permitted to go further.

To attempt now to stretch the already over-extended judicially-created right to apply to a situation where a ship which is perfectly sound has become unseaworthy for a split second in a split second, after which it becomes sound again, is, we submit, unwarranted. With due trepidation, we suggest that the proper method of bringing the jurisprudence back into proper focus is to reverse the rather substantial body of law which destroys the tried and true base of liability (real unseaworthiness) and holds a shipowner for an injury, (based on an unreal definition of unseaworthiness) due for example, to beans falling from sacks during loading or some other happening on land completely foreign to the condition of the ship itself.[31]

Although counsel knows of no accurate source of

[30] Reed v. Steamship YAKA, 373 U.S. 410, 83 S. Ct. 1349 (1963); Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731, 87 S. Ct. 1419 (1967).

[31] Cf. Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S. Ct. 1185 (1963); Hagans v. Ellerman & Bucknall Steamship Co., Ltd., 318 F.2d 563 (3rd Cir. 1963).

statistics which are available to show the number of federally compensable injuries which result in suits against shipowners (wherein the stevedore-employer may in fact foot the bill), it is believed that the heavy dockets of the District Courts in the busy seaports of the country are conclusive proof of the extraordinary increase in litigation in this field directly attributable to this judicially created liability, which has never been legitimated by the Congress.

It may be that Your Honors will say that the general rule referred to is now so firmly imbedded in our jurisprudence as to preclude further argument on its propriety, but the instant case presents an effort to establish an additional liability, over and beyond any heretofore approved by this Court. We respectfully urge that the door of open end liability on the shipowner not be closed so as to eliminate the single remaining ground upon which a personal injury claim of a longshoreman now may be defended. If a contrary result is reached, the shipowner will have to do exactly what this Court and all other courts have said need not be done: furnish an accident-free ship. All courts have consistently recognized that it would be improper to place such an obligation on him.

We respectfully submit that phrases such as "judicial legerdemain" and "instantaneous alchemy"[32] are not lightly used by experienced sitting judges, and must mean that there is something wrong with the Court's present definition of liability and its interpretation of the Harbor

---

[32] Justice Stewart in Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S. Ct. 1196 (1962); Judge Moore in Candiano, supra, n. 10, where he also suggested that the instances to which the word unseaworthy had been applied had "advanced (or retrogressed) from the absurd to the ridiculous"; Judge Friendly in Skibinski, supra, n. 22; and Judge Brown in Grigsby, supra, n. 17.

Workers' Act. We submit that it is time for review and retrenchment, not for a further extension of an already unpopular legal concept which is intelligible to neither the courts nor the bar, and which has no basis in sociology, economics, legislative interpretation or history.

If Justice Harlan's opinion in *Moragne*[33] could be plagiarized and paraphrased, it could read in this context as follows:

> "The rule of *Sieracki* should not be regarded as a closed proposition — it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has developed, and, in conjunction with its corollaries, *Crumady*, *Ryan*, *Yaka* and *Halcyon*, has produced litigation-spawning confusion in an area that should be easily susceptible to more workable solutions. The rule (that the warranty of seaworthiness has been breached by the actions of the stevedore in bringing defective gear or equipment aboard or by negligent use of the ship's sound equipment) has had a long opportunity to prove its acceptability, and instead has suffered severe criticism (except from labor). To supplant the present disarray in this area with a rule both more simple and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason."

---

[33] Moragne v. States Marine Lines, Inc., ... U.S. ....., 90 S. Ct. 1772 (1970).

We urge that the Court take this opportunity to look at the overall situation in which a shipowner finds himself under the present state of the law, and that Your Honors reconsider the precedents which have been established and threaten the faith of the judiciary in itself.

CONCLUSION

We respectfully submit that the Court below was right in holding that the motion for summary judgment should have been maintained and in concluding that there is no room in our jurisprudence for the rule that instantaneous negligence can create actionable instantaneous unseaworthiness. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

Charles Kohlmeyer, Jr.
1800 National Bank of Commerce Building
New Orleans, Louisiana 70112
Attorney for Respondents

July 30, 1970.

Of Counsel:
Thomas W. Thorne, Jr.
Lemle, Kelleher, Kohlmeyer, Matthews & Schumacher
Benjamin W. Yancey
Maurie D. Yager
Terriberry, Carroll, Yancey & Farrell